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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

RED HILL ENTERPRISES,

Plaintiff and Appellant,

v.

B. MICHAEL GOULD et al.,

Defendants and Appellants.

B193939

(Los Angeles County
Super. Ct. No. BC294922)

APPEALS from orders and a judgment of the Superior Court for the County of Los Angeles County, John P. Shook, Judge. Reversed in part and remanded.

Murtaugh Meyer Nelson & Treglia and John R. Armstrong for Plaintiff and Appellant.

Philip D. Dapeer for Defendants and Appellants.

B. Michael Gould and LTU Extension, Inc. appeal from the judgment entered after the jury returned a special verdict finding in favor of Red Hill Enterprises on its claims for fraudulent conveyance, conversion, money had and received and intentional interference with prospective economic advantage, as well as on Red Hill's claim Gould was the alter ego of LTU Extension and Learning Tree University (Learning Tree). In its cross-appeal Red Hill contends the trial court erred in granting Gould and LTU Extension's motion for nonsuit as to punitive damages, failing to award Red Hill its attorney fees on the complaint and denying Red Hill's motion to make Gould jointly and severally liable for attorney fees awarded to Red Hill for successfully moving to strike Learning Tree's cross-complaint. We reverse the trial court's order granting nonsuit on Red Hill's claim for punitive damages and remand for a new trial on that issue. We also reverse the judgment to the extent it denies Red Hill's request for attorney fees on the complaint and the order denying Red Hill's motion to make Gould jointly and severally liable for attorney fees incurred in successfully striking the cross-complaint.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Underlying Judgment and Red Hill's Efforts To Collect It; the Sale of Learning Tree's Assets to Corinthian Colleges, Inc.; and the Third Amended Complaint*

Red Hill's predecessor entity had leased space to Learning Tree.¹ In 1998 Red Hill obtained a judgment against Learning Tree for \$108,724.61, including attorney fees and costs, following a dispute over the terms of the lease. Gould, Learning Tree's president,² was a party to the action, but Red Hill agreed to dismiss him in exchange for his and Learning Tree's waiver of their right to appeal the judgment and Learning Tree's promise it would make payments on the judgment pursuant to an installment plan. Red Hill filed

¹ Learning Tree provided courses in business and management, design, education and health and recreation.

² Gould was one of the founders of GSG Enterprises, which later changed its name to Learning Tree.

abstracts of judgment in Los Angeles, Orange and Ventura Counties in 1998 and recorded a personal property lien against Learning Tree's assets in February 2000.

In early 2002 Learning Tree stopped making payments to Red Hill; the principal remaining on the debt was then approximately \$51,000. Red Hill was able to recover an additional \$2,200 after levying against Learning Tree's bank accounts. Red Hill subsequently discovered Learning Tree maintained very little cash in its bank accounts because its income was deposited into, and expenses paid from, an account held by LTU Extension, a for-profit corporation of which Gould was the chief executive officer and sole shareholder. LTU Extension had been formed by Gould in 1994 to manage and run Learning Tree, a non-profit corporation.³

On December 20, 2002 Red Hill filed a complaint in Orange County Superior Court against Learning Tree, LTU Extension, Gould and others, asserting claims for fraudulent transfer, conspiracy, negligence and negligence per se. The parties then stipulated to transfer the action to Los Angeles County Superior Court. Soon thereafter, Red Hill learned Learning Tree's assets had been sold to Corinthian Colleges, Inc. for more than \$3 million pursuant to an asset purchase agreement dated December 17, 2002; the transaction had a closing date of January 1, 2003.

The asset purchase agreement had required Learning Tree and LTU Extension to deliver satisfactory evidence to Corinthian Colleges that all debts relating to Learning Tree, including liens, other than those expressly identified or falling into certain categories, "have been satisfied and paid in full or will be satisfied and paid in full from the Cash Consideration [portion of the purchase price] immediately after the Closing." In a letter agreement dated December 31, 2002, however, Corinthian Colleges agreed to

³ Christy Wilson, who had worked at Learning Tree from 1982 through April 2004, testified LTU Extension was formed because Learning Tree had been embroiled in a long and costly litigation with Learning Tree International over use of the company name. Wilson testified she had been "told that [LTU Extension] would own the intellectual assets of Learning Tree University, and they would be bought or transferred, or whatever the mechanism was, to be owned by LTU Extension and they would then be protected from Learning Tree International."

waive this requirement with respect to Red Hill's judgment in exchange for Learning Tree and LTU Extension's agreement they would be liable for it and would indemnify and defend Corinthian Colleges in any action to collect it. According to the letter agreement, Learning Tree and LTU Extension represented and warranted that "Redhill is currently unable to enforce the Judgment and collect the remaining balance from Learning Tree and LTU Extension, and that Learning Tree and LTU Extension do not intend to make any additional payments under the Judgment."⁴ Unlike the Red Hill lien, a junior lien held by a bank in connection with a loan made to Learning Tree for more than \$400,000, which Gould had personally guaranteed, was paid from the proceeds of the asset sale.

After the sale Learning Tree was operated as a division of Corinthian Colleges by Gould, still its president, who became an employee of Corinthian Colleges. Learning Tree, under its former name GSG Enterprises, filed for bankruptcy in March 2004.

On February 8, 2005 Red Hill filed a third amended complaint--Corinthian Colleges had previously been added as a defendant--asserting claims for fraudulent conveyance (including conspiracy and aiding and abetting theories of liability), conversion, money had and money received and interference with prospective business advantage. As in the initial complaint, Red Hill alleged Gould was the alter ego of Learning Tree and LTU Extension.

2. Learning Tree's Cross-complaint for Abuse of Process

In December 2003, prior to its bankruptcy, Learning Tree filed a cross-complaint against Red Hill and its attorneys for abuse of process, alleging they had misused the legal processes in their efforts to collect on Red Hill's judgment by, among other things, obtaining a writ of execution in an amount they knew was incorrect and while Red Hill was suspended as a corporation and thus unable to enforce the judgment. Red Hill successfully moved to strike the cross-complaint pursuant to Code of Civil Procedure

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Although Red Hill's corporate powers had been suspended at some time in early-to-mid 2002, the corporation was in good standing as of December 9, 2002.

section 425.16. In January 2006 we affirmed the trial court's order granting Red Hill and its attorneys' special motion to strike and held Red Hill and its attorneys were entitled to an award of attorney fees and costs on appeal. (*Learning Tree University v. Red Hill Enterprises* (Jan. 4, 2006, B178876) [nonpub. opn.].)

3. *The Jury's Special Verdict and the Trial Court's Order Granting Nonsuit on Red Hill's Claim for Punitive Damages*

Prior to the commencement of trial the parties and the court agreed to bifurcate the trial of punitive damages. On Tuesday, May 24, 2005, the jury returned a special verdict finding, in part, Learning Tree, Gould and LTU Extension were each liable for making or participating in the unlawful/fraudulent transfer of Learning Tree's assets or property, which was a substantial factor in causing harm or loss to Red Hill; Gould and LTU Extension were liable for conspiring with and aiding and abetting Learning Tree in the unlawful/fraudulent transfer of Learning Tree's assets or property; and Learning Tree, Gould and LTU Extension were liable for conversion and for intentionally interfering with Red Hill's prospective economic advantage. Although these jury findings were directed to Learning Tree, as well as Gould and LTU Extension, because it had filed for bankruptcy, no judgment was entered against Learning Tree. However, the jury also found Gould was the alter ego of Learning Tree and LTU Extension and LTU Extension was part of a single enterprise with Learning Tree and was Learning Tree's alter ego. Finally, the jury found by clear and convincing evidence that Gould and LTU Extension had acted with malice, fraud or oppression, entitling Red Hill to punitive damages. The jury found in favor of Corinthian Colleges and against Red Hill on all theories of liability.

After the special verdict was returned, counsel and the court discussed scheduling the second phase of the trial to determine the amount of punitive damages. Gould's counsel agreed to provide Red Hill all the financial records Red Hill had requested in its notice to appear and produce documents for trial, which it had timely served prior to the

commencement of the first phase of trial.⁵ To accommodate, among other things, conflicts with some jurors' schedules and Red Hill's request for sufficient time to review Gould's and LTU Extension's financial information, trial was scheduled to resume on Friday, May 27, 2005. The court, however, excused Gould from attending trial that day because he had a previously scheduled a fishing trip with his son. Red Hill had objected to excusing Gould unless he first produced the promised financial records and agreed to stipulate the records were admissible.

Although counsel returned to court the following day, Wednesday, May 25, 2005, to argue Gould and LTU Extension's motion to vacate the judgment, counsel for Gould and LTU Extension, Daniel Bergman, did not provide any financial information. Counsel for Red Hill informed the court, "The court should be advised that I was not given any of Mr. Gould's financial information this morning, and I'm told by Mr. Bergman that he expects to have that ready sometime tonight. I would ask that be produced to my office no later than 10:00 a.m. tomorrow, and perhaps, if there is an issue, that we have a conference call in the afternoon if there is something that I felt we need that was not produced in that regard. So we could be ready to argue on Friday morning." In response Mr. Bergman explained, "As far as the documents are concerned, and maybe that was my mistake, when we left yesterday, I thought that we were going to bring them at 8:30 on Friday morning, we were going to bring those documents -- start at 9 and then we would have time to look at them. But I thought we changed it -- I can try to get a hold of Mr. Gould. I know he is trying to put together the documents without waiving an attorney-client privilege. If that was my mistake, I apologize. But I will try to get the documents to [counsel for Red Hill] tomorrow."

⁵ Red Hill had served Gould and LTU Extension with deposition notices and demands for the production of documents, including LTU Extension's and Gould's financial records. After Gould disputed he was required to provide his personal financial information on grounds including that Red Hill had not demonstrated it could not obtain the information from other sources, Red Hill moved to compel the depositions and document production. The trial court denied Red Hill's motion, finding the document requests were overbroad and "[got] into invasion of personal privileges of individuals."

Some financial documents were finally produced Friday morning, May 27, 2005, just before trial was to resume, but, according to Red Hill's counsel, were "scant" and "not near close to what I asked to be produced."⁶ The trial court denied Red Hill's request it be excused from its burden to show Gould and LTU Extension's financial condition as a prerequisite to obtaining punitive damages based on the belated and limited production of documents, as well as the absence of Gould from trial to testify.

Red Hill subsequently proposed to the court other means of establishing Gould's financial condition, including having the court take judicial notice of public records showing Gould's real estate holdings and their taxable value, as well as introducing documents describing the sums Gould and LTU Extension had received pursuant to the terms of the asset purchase agreement. All of Red Hill's suggestions were rejected. Red Hill ultimately had Richard Schmid, Red Hill's only principal, testify in an attempt to authenticate the public records regarding Gould's real estate holdings based on Schmid's own experience buying and selling commercial and residential properties. The court sustained Gould and LTU Extension's objections to the admission of the evidence. After Red Hill rested, the court granted Gould and LTU Extension's motion for nonsuit as to

⁶ The documents requested were (1) Gould's "personal bank account information from January 1, 2002 to present for all checking and savings accounts you have at any bank or other financial institutions(s) (i.e., credit unions, savings and loans, etc.), all money market accounts that you have the right to withdraw money from, all documents evidencing securities and investments (i.e. stocks, bonds, annuities, IRS's [*sic*], etc.), all documents regarding the cash value of any and all life insurance policies you have, all documents showing your interest in real and/or personal property, including but not limited to deeds, mortgages, home loans, etc., all documents showing the present value of real and/or personal property that you presently own, all credit card and other information concerning your personal debts (i.e. mortgages, credit card debt, other loan debts), and your federal and state income tax returns from tax year 2002 to present;" and (2) "All documents and/or writings in your possession, custody, or control indicating the present value of LTU Extension, including its federal and state tax return and accounting information from January 1, 2002 to present."

Produced documents included tax returns for LTU Extension for 2002 and 2003, a few of Gould's credit card and home loan statements and bank statements from 2004 through 2005.

punitive damages on the ground Red Hill had failed to establish the defendants' present financial condition.

4. The Trial Court's Denial of Red Hill's Claim for Attorney Fees

Prior to the commencement of trial, the parties had stipulated, if Red Hill were to prevail, the court would determine Red Hill's entitlement to attorney fees and the amount of fees as an element of its damages. Accordingly, Red Hill moved for entry of judgment, including an award of attorney fees, after the jury's verdict was returned. Because it had obtained relief from the automatic stay imposed in Learning Tree's bankruptcy action, Red Hill also sought to include in the judgment its attorney fees and costs in connection with its successful motion to strike Learning Tree's cross-complaint for abuse of process. To that end, Red Hill moved to amend the judgment awarding attorney fees and costs incurred in connection with the motion to strike the abuse-of-process cross-complaint to add Gould as a co-judgment debtor with Learning Tree on the ground the jury had found Gould was the alter ego of Learning Tree. Gould and LTU Extension contested Red Hill's entitlement to attorney fees in prosecuting the complaint, as well as the propriety of adding Gould as a co-judgment debtor responsible for the attorney fees incurred in connection with the cross-complaint, arguing, in part, Red Hill's dismissal of Gould from the underlying lease action operated as *res judicata* shielding Gould from any liability for attorney fees in connection with efforts to enforce that judgment.

After extensive briefing and oral argument regarding Red Hill's entitlement to, and the amount of, attorney fees and costs, Gould and LTU Extension and Red Hill submitted alternative judgments. On July 3, 2006 the court signed Gould and LTU Extension's proposed judgment. With respect to Red Hill's complaint, the judgment stated, "Attorney fees claimed by Plaintiffs against Defendants LTU Extension and B. Michael Gould are denied." With respect to the cross-complaint, the judgment specified the amount of fees incurred in connection with the proceedings before the trial court, as well as on appeal, and stated those fees would be recoverable only from Learning Tree. On the same day the trial court signed an order granting Red Hill's motion seeking

attorney fees from Learning Tree in connection with the cross-complaint but denying “[t]hat portion of the motion seeking to amend the award to include Defendant B. Michael Gould as an additional judgment debtor . . . based upon the doctrine of *res judicata* arising from the prior underlying action between the parties to this matter.”

CONTENTIONS

Gould and LTU Extension contend there is insufficient evidence to support the jury’s special verdict finding Red Hill suffered damage as a result of their misconduct or its finding Gould is the alter ego of Learning Tree and LTU Extension.⁷ Red Hill contends the trial court erred in granting Gould and LTU Extension’s motion for nonsuit as to punitive damages, failing to award Red Hill its attorney fees incurred pursuing the complaint and denying its motion to make Gould jointly and severally liable for attorney fees as to the cross-complaint.

DISCUSSION

1. *Gould and LTU Extension Have Forfeited Their Arguments on Appeal*

Appellate review begins with the presumption the judgment of the trial court is correct. (*In re Marriage of Arceneaux* (1990) 51 Cal.3d 1130, 1133; *Fleishman v. Superior Court* (2002) 102 Cal.App.4th 350, 357.) It is the burden of the appellants to show reversible error by an adequate record. (*Ballard v. Uribe* (1986) 41 Cal.3d 564, 574; *Robbins v. Los Angeles Unified School Dist.* (1992) 3 Cal.App.4th 313, 318.) Meeting this burden requires citations to the record to direct the court to pertinent evidence or other matter in the record that demonstrates reversible error. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115; *Culbertson v. R.D. Werner Co.*,

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Gould and LTU Extension also contend the determination of alter ego liability should have been made by the court, not the jury. (See *Dow Jones Co. v. Avenel* (1984) 151 Cal.App.3d 144, 147 [“[i]t is well-settled that the alter ego doctrine is ‘essentially an equitable one and for that reason is particularly within the province of the trial court’”].) Gould and LTU Extension, however, invited any error by agreeing to the submission of this equitable issue to the jury. (See *California Coastal Com. v. Tahmassebi* (1998) 69 Cal.App.4th 255, 260 [“[i]t is settled that where a party by his conduct induces the commission of an error, under the doctrine of invited error he is estopped from asserting the alleged error as grounds for reversal”].)

Inc. (1987) 190 Cal.App.3d 704, 710.). Specifically, the appellant’s opening brief must “[p]rovide a summary of the significant facts limited to matters in the record” (Cal. Rules of Court, rule 8.204(a)(2)(C))⁸ with a citation to the volume and page number of the record where those facts appear (rule 8.204(a)(1)).

“[I]t is counsel’s duty to point out portions of the record that support the position taken on appeal.” (*Del Real v. City of Riverside* (2002) 95 Cal.App.4th 761, 768.) It is not the proper function of the Court of Appeal to search the record on behalf of appellants or to serve as “backup appellate counsel.” (*Mansell v. Board of Administration* (1994) 30 Cal.App.4th 539, 545-546.)

Similarly, we start with a ““presumption that the record contains evidence to sustain every finding of fact.”” (*People v. Dougherty* (1982) 138 Cal.App.3d 278, 282.) Any challenge to the factual findings requires the appellants to demonstrate there is no substantial evidence to support those findings. (*Ibid.*) This demonstration requires the appellants to ““state fully, with transcript references, the evidence which is claimed to be insufficient to support the findings.”” (*Ibid.*) The appellants must ““set forth in their brief all of the material evidence on the point and not merely their own evidence.”” (*Ibid.*, italics omitted; see *Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881.)

These rules of appellate procedure are designed to facilitate the efficient administration of justice -- allowing the court to focus on the important job of resolving disputed legal issues and correcting errors -- and are not complicated or burdensome. Failure to follow these rules is adequate ground to find an appellant has forfeited his or her arguments on appeal. (*Del Real v. City of Riverside, supra*, 95 Cal.App.4th at p. 768 [“violation of the rules of court may result in the striking of the offending document, the waiver of the arguments made therein, the imposition of fines and/or the dismissal of the appeal”]; *Gunn v. Mariners Church, Inc.* (2008) 167 Cal.App.4th 206, 218 [argument on appeal deemed forfeited by failure to present factual analysis and legal authority on each

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References to rule or rules are to the California Rules of Court.

point raised]; *People ex rel. Dept. of Alcoholic Beverage Control v. Miller Brewing Co.* (2002) 104 Cal.App.4th 1189, 1200 [same].)

Gould and LTU Extension have completely failed to follow these basic rules. Their brief begins with an “introduction” that contains only enough facts, with no citation to the record, to barely decipher the nature of the underlying action. Gould and LTU Extension’s section entitled “statement of the facts” contains no facts at all and is simply a two paragraph statement of their argument Red Hill failed to present any evidence that it had been damaged. The argument sections of the brief directed to the sufficiency of the evidence fare no better with, at best, conclusory assertions such as, “Red Hill failed to provide any evidence of damage. Why? Because Red Hill’s idle acts included never trying to levy against the assets nor did Red Hill show any prejudice from the sale.”⁹ (Cf. *Guthrey v. State of California, supra*, 63 Cal.App.4th at pp. 1115-1116 [“““Instead of a

9

Although Gould and LTU Extension’s combined reply and cross-respondents’ brief is somewhat improved -- it at least contains a summary of the extensive factual statement Red Hill set forth in its respondent and cross-appellant’s opening brief, as well as some analysis -- it nevertheless still fails to provide any citations to the record. (See *City of Lincoln v. Barringer* (2002) 102 Cal.App.4th 1211, 1239 & fn. 16 [forfeiture of argument for failure to cite to the record in argument section of brief not cured by inclusion of factual background section with citations]; see generally Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2008) ¶ 9:36, p. 9-11 (rev. #1, 2008) [“[a]ny statement in a brief concerning matters in the appellate record -- whether factual or procedural and no matter where in the brief the reference to the record occurs—*must be supported by a citation to the record*”].)

Additionally, Gould and LTU Extension’s reply and cross-respondents’ brief raises a new argument relevant only to their appeal—that all of Red Hill’s claims belonged to the bankruptcy trustee and thus Red Hill lacked standing to assert them against Gould and LTU Extension. We do not consider this argument both because it has been raised for the first time in a reply brief (*In re Marriage of Ackerman* (2006) 146 Cal.App.4th 191, 214 [“we need not consider new issues raised for the first time in a reply brief in the absence of good cause”]) and because it impermissibly attempts to incorporate by reference arguments made in pleadings filed in the trial court. (See *Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 295, fn. 20 [“[i]t is well settled that the Court of Appeal does not permit incorporation by reference of documents filed in the trial court”].) Gould and LTU Extension’s motion to augment the record to include documents related to this new argument is denied.

fair and sincere effort to show that the trial court was wrong, appellant’s brief is a mere challenge to respondents to prove that the court was right.’” [Citation.] Therefore, plaintiff’s contention that the trial court erred by granting defendants’ motion for summary judgment is deemed waived.”.)¹⁰

Courts in some cases have exercised their discretion to consider an appeal notwithstanding deficient briefing. (See *Del Real v. City of Riverside*, *supra*, 95 Cal.App.4th at p. 768 [court exercised discretion to consider position “[i]n spite of the failures in the briefing”].) Even if we were otherwise inclined to do so, however, because Gould and LTU Extension have failed to provide a complete record on appeal, it is impossible to consider their appeal on the merits. We have four volumes of reporter’s transcripts. Volume three reflects the trial proceedings on May 16 and May 17, 2005. After the completion of the examination of Richard Schmid, Red Hill’s principal, on May 17, 2005, counsel and the court discussed at sidebar Red Hill’s request that portions of the deposition transcript of Nolan Miura (from Corinthian Colleges) be read to the jury. Because Miura was to testify the following day, the court deferred ruling on the request. The reporter’s transcript indicates the proceedings were adjourned until

¹⁰ Gould and LTU Extension’s opening brief appears to be a combination of arguments copied from their motions for a judgment notwithstanding the verdict and for a new trial. A cursory factual statement may be appropriate in posttrial papers filed with the trial court, which had the benefit of sitting through the trial and recent familiarity with the facts. We do not have any such knowledge of the case. This is but one of many reasons why good appellate briefing does not simply incorporate work product prepared for the trial court. (See *In re Marriage of Shaban* (2001) 88 Cal.App.4th 398, 410 [“[A]ppellate practice entails rigorous original work in its own right. The appellate practitioner who takes trial level points and authorities and, without reconsideration or additional research, merely shovels them in to an appellate brief, is producing a substandard product.”]; *Sebago, Inc. v. City of Alameda* (1989) 211 Cal.App.3d 1372, 1387-1388 [“[w]e take this opportunity to advise appellate attorneys who use material from trial memoranda to take care in adapting the material to the altered focus of appellate review”]; see generally Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs, *supra*, ¶ 9:30, p. 9-9 (rev. #1, 2008) [“[w]ritten arguments presented in a *trial* brief or memorandum of points and authorities in the proceedings below should *not* be replicated verbatim on appeal unless they cannot possibly be improved”].)

Wednesday, May 18, 2005. However, volume four of the reporter’s transcript begins with the proceedings on May 24, 2005, by which point the jury had submitted questions during its deliberations. Our record on appeal is thus missing the testimony of Miura and additional witnesses, if any, closing arguments, any discussion of the jury instructions or the special verdict form and the reading of the jury instructions.¹¹ We are simply unable to consider the merits of Gould and LTU Extension’s arguments without an adequate record. (See *Wagner v. Wagner* (2008) 162 Cal.App.4th 249, 259 [denial of motion for relief unreviewable because of party’s failure to provide transcript of hearing on motion or copy of court’s minute order denying motion; “[a]s the party challenging a discretionary ruling, [the appellant] had an affirmative obligation to provide an adequate record so that we could assess whether the court abused its discretion”].)¹²

2. *The Trial Court Erred in Denying on Res Judicata Grounds Red Hill’s Requests for Attorney Fees Against Gould and LTU Extension*

a. *Standard of review*

An order granting or denying an award of attorney fees is generally reviewed for an abuse of discretion. (See, e.g., *MHC Financing Limited Partnership Two v. City of Santee* (2005) 125 Cal.App.4th 1372, 1397; *Salawy v. Ocean Towers Housing Corp.* (2004) 121 Cal.App.4th 664, 669.) However, the question of a party’s entitlement to attorney fees is a legal issue subject to de novo review. (*Connerly v. State Personnel Bd.* (2006) 37 Cal.4th 1169, 1175-1176; *Leamon v. Krajciwicz* (2003) 107 Cal.App.4th 424, 431; *Carver v. Chevron U.S.A., Inc.* (2002) 97 Cal.App.4th 132, 142.)

¹¹ Red Hill included in its cross-appellant’s appendix the written jury instructions, even though they are not relevant to the issues Red Hill raises in its cross-appeal.

¹² Although we do not consider the merits of Gould and LTU Extension’s appeal, we nonetheless are dismayed that 23 pages of the 35-page opening brief appear to be largely copied, without attribution, from a treatise addressing the alter ego doctrine in California (Presser, *Piercing the Corporate Veil* (2004) State Law, § 2.5, pp. 2-28 to 2-49), but with significant omissions and alterations in the actual text to reach a result that both misstates California law and is directly contrary to the author’s analysis.

- b. *Red Hill is entitled to recover attorney fees incurred in overcoming Gould and LTU Extension's tortious efforts to obstruct collection of its judgment against Learning Tree*

Code of Civil Procedure section 685.040 authorizes the recovery of attorney fees in an action to enforce a judgment when, as here, the underlying judgment includes an award of attorney fees.¹³ (*Jaffe v. Pacelli* (2008) 165 Cal.App.4th 927, 934-935.) Without question, if Learning Tree had remained an active party in the litigation (that is, if it had not filed a bankruptcy petition and thus been protected from liability in Red Hill's action by the resulting automatic stay), the jury's findings that Learning Tree had obstructed Red Hill's collection efforts would have justified an award of attorney fees under section 685.040. (*Jaffe*, at p. 938.) We believe the jury's findings that Gould and LTU Extension directly participated in Learning Tree's unlawful/fraudulent transfer of property and also conspired with and aided and abetted Learning Tree's efforts to fraudulently transfer property to avoid enforcement of Red Hill's judgment similarly justify an award of attorney fees under that section and general fraudulent conveyance law. (See *Filip v. Bucurenciu* (2005) 129 Cal.App.4th 825, 839-840 [Uniform Fraudulent Transfer Act, codified in Civ. Code, § 3439 et seq., broadly empowers court to fashion relief to remedy defendants' fraudulent conduct]; cf. *Jaffe*, at p. 938 [attorney fees properly awarded for litigation efforts in bankruptcy court that prevented judgment debtor from sabotaging judgment creditor's collection efforts even though such fees would not normally be recoverable in bankruptcy proceeding].)

The trial court did not disagree with Red Hill's analysis of its entitlement to an award of fees under Code of Civil Procedure section 685.040 against Gould and LTU

¹³ Code of Civil Procedure section 685.040 provides, "The judgment creditor is entitled to the reasonable and necessary costs of enforcing a judgment. Attorney's fees incurred in enforcing a judgment are not included in costs collectible under this title unless otherwise provided by law. Attorney's fees incurred in enforcing a judgment are included as costs collectible under this title if the underlying judgment includes an award of attorney's fees to the judgment creditor pursuant to subparagraph (A) of paragraph (10) of subdivision (a) of [Code of Civil Procedure] Section 1033.5."

Extension, but nonetheless denied those fees, apparently on the ground the dismissal of Gould from the underlying breach of lease contract barred any recovery under the doctrine of res judicata.¹⁴ That ruling was in error.

Under the doctrine of res judicata, a valid, final judgment on the merits precludes parties or their privies from relitigating the same “cause of action” in a subsequent suit. (*Mycogen Corp. v. Monsanto Co.* (2002) 28 Cal.4th 888, 896; *Slater v. Blackwood* (1975) 15 Cal.3d 791, 795.) “Res judicata, or claim preclusion, prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them. . . . Under the doctrine of res judicata, if a plaintiff prevails in an action, the cause is merged into the judgment and may not be asserted in a subsequent lawsuit; a judgment for the defendant serves as a bar to further litigation of the same cause of action.” (*Mycogen*, at pp. 896-897, citation and fn. omitted.) Principles of res judicata are also applied to determine whether a voluntary dismissal with prejudice, known by the common law term “retraxit,” precludes causes of actions in a subsequent litigation. (*Alpha Mechanical, Heating & Air Conditioning, Inc. v. Travelers Casualty and Surety Co. of America* (2005) 133 Cal.App.4th 1319, 1331 [“a court will apply principles of res judicata to resolve precisely what causes of action or issues are barred as a result of the retraxit”].)

California law defines a “cause of action” for purposes of the res judicata doctrine by analyzing the primary right at stake: “[A] ‘cause of action’ is comprised of a ‘primary right’ of the plaintiff, a corresponding ‘primary duty’ of the defendant, and a wrongful act by the defendant constituting a breach of that duty. [Citation.] The most salient

¹⁴ The court’s order granting in part and denying in part Red Hill and its attorneys’ motion for attorney fees incurred in successfully moving to strike Learning Tree’s abuse-of-process cross-complaint expressly declined to award fees against Gould or to make him jointly liable for these fees under the doctrine of res judicata. The trial court, however, did not state its rationale for denying Red Hill’s request for attorney fees from Gould and LTU Extension incurred in prosecuting the complaint itself. Because res judicata is the only argument Gould and LTU Extension present on appeal to justify denial of Red Hill’s attorney fees that was also presented to the trial court, that is the only ground we consider.

characteristic of a primary right is that it is indivisible: the violation of a single primary right gives rise to but a single cause of action. [Citation.] A pleading that states the violation of one primary right in two causes of action contravenes the rule against ‘splitting’ a cause of action.” (*Crowley v. Katleman* (1994) 8 Cal.4th 666, 681.) “[I]f two actions involve the same injury to the plaintiff and the same wrong by the defendant then the same primary right is at stake even if in the second suit the plaintiff pleads different theories of recovery, seeks different forms of relief and/or adds new facts supporting recovery.” (*Tensor Group v. City of Glendale* (1993) 14 Cal.App.4th 154, 160.) “On the other hand, different primary rights may be violated by the same wrongful conduct.” (*Branson v. Sun-Diamond Growers* (1994) 24 Cal.App.4th 327, 342.)

The primary right at issue in Red Hill’s initial action against Learning Tree was the right to receive income from Gould and Learning Tree in accordance with the terms of the lease between Red Hill and Learning Tree. Gould was voluntarily dismissed from that action, and thus Red Hill relinquished any right to receive that income from him, limiting its recourse to only Learning Tree. Learning Tree was ultimately found liable for payment of utilities, rent, consequential damages, interest and attorney fees and costs incurred in procuring that judgment. In contrast, the primary right at issue in the instant action was Red Hill’s right to payment of the underlying judgment without unlawful obstruction by Learning Tree or improper interference by third parties, like Gould and LTU Extension. The factual allegations and wrongful conduct at issue in the two actions are completely different. Indeed, the entire basis for the instant action is conduct that occurred *after* Gould was dismissed from the underlying action. In sum, Gould’s dismissal from the initial action has no preclusive effect on claims arising from conduct occurring after that dismissal.¹⁵

¹⁵ Red Hill contends Gould and LTU Extension only challenged the validity of \$16,657.50 of Red Hill’s claimed fees of \$181,804 and states it is willing to concede those sums and accept an award of \$165,146.50. The record reflects, however, that Gould and LTU Extension only challenged \$16,657.50 of fees “[a]s examples, and not by way of limitation,” and was instead primarily focused on disputing Red Hill’s entitlement

c. *Red Hill is entitled to add Gould as a co-judgment debtor liable for attorney fees and costs under Code of Civil Procedure section 425.16, subdivision (c), based on the jury's alter ego findings*

Relying on the automatic stay in effect as a result of Learning Tree's bankruptcy, the trial court initially denied without prejudice Red Hill's and its attorneys' motion for attorney fees and costs incurred in pursuing their special motion to strike the cross-complaint. (See Code Civ. Proc., § 425.16, subd. (c).) We held in our original decision Red Hill was entitled to an award of attorney fees and costs incurred on appeal in defending the trial court's order striking the cross-complaint (*Learning Tree University v. Red Hill Enterprises, supra*, B178876 at pp. 10-11) and noted the trial court could properly revisit the issue of fees and costs in connection with the motion itself on remand "with due consideration given to the status of Learning Tree's bankruptcy proceedings." (*Id.* at p. 11 & fn. 12.) Red Hill subsequently obtained relief from the automatic stay with respect to this issue.

Following the conclusion of the trial and briefing and argument on the various attorney fee issues, the trial court granted Red Hill's motion pursuant to Code of Civil Procedure section 425.16, subdivision (c), for costs and fees in both the trial and appellate courts, and incorporated its order granting those fees into its judgment in this matter. However, based on the same erroneous application of the doctrine of res judicata discussed in the preceding section of this opinion, the trial court improperly denied Red Hill's motion to add Gould as a co-judgment debtor with respect to those costs and fees.

Code of Civil Procedure section 187 authorizes a trial court to amend a judgment to add judgment debtors. (*Postal Instant Press, Inc. v. Kaswa Corp.* (2008) 162 Cal.App.4th 1510, 1517; *Hall, Goodhue, Haisley & Barker, Inc. v. Marconi Conf. Center Bd.* (1996) 41 Cal.App.4th 1551, 1554-1555.)¹⁶ Under this section, "[j]udgments may be

to any fees whatsoever. Consequently, on remand Gould and LTU Extension may challenge the reasonableness of all of Red Hill's fees.

¹⁶ Code of Civil Procedure section 187 provides, "When jurisdiction is, by the [C]onstitution or this code, or by any other statute, conferred on a court or judicial

amended to add additional judgment debtors on the ground that a person or entity is the alter ego of the original judgment debtor.” (*Hall, Goodhue, Haisley & Barker, Inc.*, at p. 1555.) The judgment may be amended “‘at any time so that [it] will properly designate the real defendants.’” (*Ibid.*) “This is an equitable procedure based on the theory that the court is not amending the judgment to add a new defendant but is merely inserting the correct name of the real defendant. [Citations.] ‘Such a procedure is an appropriate and complete method by which to bind new individual defendants where it can be demonstrated that in their capacity as alter ego of the corporation they in fact had control of the previous litigation, and thus were virtually represented in the lawsuit.’” (*NEC Electronics Inc. v. Hurt* (1989) 208 Cal.App.3d 772, 778.)

In light of the jury’s finding that Gould was the alter ego of Learning Tree, Gould is properly added as a judgment debtor pursuant to Code of Civil Procedure section 187, jointly liable with Learning Tree for all costs and attorney fees awarded Red Hill for its successful motion to strike the abuse-of-process cross-complaint. Learning Tree’s (and Gould’s) conduct in filing a meritless action against Red Hill that impinged on Red Hill’s protected speech and petitioning activity within the meaning of Code of Civil Procedure section 425.16 involved a different primary right from the primary right litigated in the underlying breach-of-lease action (and involved actions that occurred long after the lease litigation was concluded). Accordingly, whatever res judicata effect Gould’s dismissal from that action may have, it does not preclude recovery of those costs and fees.

officer, all the means necessary to carry it into effect are also given; and in the exercise of this jurisdiction, if the course of proceeding be not specifically pointed out by this code or the statute, any suitable process or mode of proceeding may be adopted which may appear most conformable to the spirit of this code.”

3. *The Trial Court Erred in Granting Nonsuit in Favor of Gould and LTU Extension on Red Hill's Claim for Punitive Damages*

“An award of punitive damages hinges on three factors: the reprehensibility of the defendant’s conduct; the reasonableness of the relationship between the award and the plaintiff’s harm; and, in view of the defendant’s financial condition, the amount necessary to punish him or her and discourage future wrongful conduct.” (*Kelly v. Haag* (2006) 145 Cal.App.4th 910, 914.) A plaintiff seeking punitive damages must introduce meaningful evidence of the defendant’s then-current financial condition so that an award will be sufficient to deter future misconduct by the defendant without being so disproportionate to the defendant’s ability to pay that it is excessive. (*Adams v. Murakami* (1991) 54 Cal.3d 105, 110-112; *Simon v. San Paolo U.S. Holding Co., Inc.* (2005) 35 Cal.4th 1159, 1185 [“defendant’s financial condition is an essential factor in fixing the amount that is sufficient to serve these goals without exceeding the necessary level of punishment”]; see *Kelly*, at p. 917 [reversing punitive damage award when “there was no evidence of any encumbrances on the [defendants’] properties at the time of trial, or of other liabilities [defendant] may have had”].)

Although it is the plaintiff’s burden to produce evidence of the defendant’s financial condition (*Adams v. Murakami*, *supra*, 54 Cal.3d at p. 119), when a defendant disobeys an order to produce information showing his or her financial condition, he or she cannot object to a punitive damage award for lack of such evidence. (*Mike Davidov Co. v. Issod* (2000) 78 Cal.App.4th 597, 608-609 (*Davidov*); see *StreetScenes v. ITC Entertainment Group, Inc.* (2002) 103 Cal.App.4th 233, 243-244 [following *Davidov*].) In *Davidov* the plaintiff obtained a compensatory damage award and sought to conduct discovery into the defendant’s financial condition prior to the bifurcated proceedings on punitive damages. The trial court ordered the defendant to produce at a hearing all records regarding his net worth. The defendant appeared without any records and argued punitive damages could not be awarded in the absence of any evidence of net worth. The trial court disagreed and fixed the punitive award at approximately four times compensatory damages. (*Davidov*, at pp. 603-604.) When the defendant raised the same

argument on appeal, Division Three of this court held it had been forfeited. The court explained, “[B]y failing to bring in any records which would reflect his financial condition, despite being ordered to do so, and by failing to challenge that ruling on appeal, defendant has waived any right to complain of the lack of such evidence.” (*Id.* at pp. 608-609; see also *id.* at p. 609 [“In this case, defendant’s records were the only source of information regarding his financial condition available to plaintiff. By his disobedience of a proper court order, defendant improperly deprived plaintiff of the opportunity to meet his burden of proof on the issue. Defendant may not now be heard to complain about the absence of such evidence.”].)

In the case at bar the trial court did not believe *Davidov*, which Red Hill had cited, was applicable because the court had not ordered Gould and LTU Extension to produce their financial records and Red Hill had not filed a motion to compel after Gould and LTU Extension’s counsel, Bergman, failed to provide financial records prior to commencement of the second phase of trial. The court in part explained, “Well, this *Davidov* case, *Mike Davidov Company* that you gave me to read, they talk about the defendant’s records were the only source of information regarding his financial condition available to the plaintiff and by his disobedience of the proper court order and we do not have that here. If we had a court order whereby I ordered Mr. Gould to turn over, you know, item A, B, C, D, something like that, and then you had those and he had not turned them over and you had information regarding it, I think I wouldn’t have a problem with that.” In response to Red Hill’s argument it had been trying to obtain the documents from the time the jury had returned with its special verdict finding Gould and LTU Extension had acted with malice, fraud or oppression and had advised the court of Gould’s failure to deliver the records, the court stated, “[T]elling the court I don’t have the documents is not a motion to compel, is it? [¶] . . . [¶] [T]he notice to produce documents was only with respect to documents that are in the possession of the responding party. So I can’t make that determination by reading a request for production and the other side submitting documents, and some they haven’t submitted. I mean, by

itself I can't make that determination as to, you know--for production, to compel production further."

Even though there was no express court order requiring Gould and LTU Extension to produce their financial records to Red Hill, as there was in *Davidov, supra*, 78 Cal.App.4th 597, under the circumstances of this case the trial court erred in concluding it had no discretion to relieve Red Hill of its obligation to introduce evidence of the defendants' financial condition as a prerequisite to recovery of punitive damages. (See *Richards, Watson & Gershon v. King* (1995) 39 Cal.App.4th 1176, 1180 [where trial court vested with discretionary decision, failure to exercise that discretion is reversible error]; see generally *KB Home v. Superior Court* (2003) 112 Cal.App.4th 1076, 1083 ["even when a decision by the trial court is generally reviewed for abuse of discretion, we must determine at the outset whether the court applied the correct legal standard to the issue in exercising its discretion, which determination is also a question of law for this court"].)

As permitted by Code of Civil Procedure section 1987, subdivision (b), Gould and LTU Extension had been served with notices to appear and produce documents at trial, having the the same effect as a subpoena. Moreover, they effectively stipulated on the record to produce the requested documents without objection.¹⁷ Not only is a subpoena

¹⁷ As discussed, after the jury returned its special verdict on Tuesday, May 24, 2005, Bergman responded to the court's inquiry whether Gould and LTU Extension were ready to proceed to the punitive damages phase, "No, I don't think so, your Honor. We will be ready by tomorrow morning. We will have to bring all of the documents in tomorrow morning." After this exchange the punitive damages phase was scheduled to begin on Friday, May 27, 2005, to accommodate conflicts in jurors' schedules and in response to Red Hill's counsel's statement he needed sufficient time to review the documents after they were produced. When Bergman failed to bring the documents to court the following day and explained he erroneously believed he was to bring them Friday, he again failed to object to producing the documents except for noting Gould was "trying to put together the documents without waiving an attorney-client privilege." Moreover, although Gould and LTU Extension had filed objections to the document requests, they stated their objections would be withdrawn if the jury determined Red Hill had a right to recover punitive damages.

the equivalent of a court order (see Code of Civ. Proc. § 1985, subd. (a) [subpoena “is a writ or order directed to a person and requiring the person’s attendance at a particular time and place to testify as a witness,” as well as production of documents in the witness’s control]), but also a stipulation, even one not submitted to the court, has been considered tantamount to a court order for purposes of imposing terminating discovery sanctions. (*Mileikowsky v. Tenet Healthsystem* (2005) 128 Cal.App.4th 262, 279-280.) As in *Davidov*, Gould’s conduct “improperly deprived plaintiff of the opportunity to meet his burden of proof on the issue” of Gould’s financial condition. (See *Davidov*, *supra*, 78 Cal.App.4th at p. 609.)

In sum, Red Hill timely requested Gould’s financial information before trial and, after the jury returned its liability verdict, articulated to the court and Gould it needed the information sufficiently in advance of the resumption of trial three days later so it could review the adequacy of the records and resolve any evidentiary concerns. After Bergman failed to produce the records the following day, and Red Hill’s counsel again explained the urgency, Bergman stated he would attempt to produce the documents the next day. He failed to do so, producing only some of them on the morning of trial, knowing Gould would not be available for examination. Under these circumstances the trial court could have, as did the trial court in *Davidov*, permitted Red Hill to try the issues of punitive damages without evidence of Gould’s financial condition. The court’s erroneous belief it was without the authority to proceed in this manner mandates reversal of the order granting Gould and LTU Extension’s motion for nonsuit.

DISPOSITION

The judgment and the order granting nonsuit on Red Hill’s claim for punitive damages are reversed, and the cause remanded for a new trial to determine the amount of punitive damages to which Red Hill is entitled. The portion of the order declining to hold Gould jointly liable with Learning Tree for attorney fees and costs awarded to Red Hill pursuant to Code of Civil Procedure section 425.16, subdivision (c), is reversed, as is the trial court’s determination Red Hill is not entitled to an award of attorney fees against Gould and LTU Extension in connection with its prosecution of its action for fraudulent

transfer and related claims. On remand, in addition to proceedings related to Red Hill's claim for punitive damages, the trial court shall determine the reasonable amount of attorney fees incurred by Red Hill and shall conduct any further proceedings, not inconsistent with this opinion, as it may deem necessary or appropriate. Red Hill is to recover its costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

PERLUSS, P. J.

We concur:

WOODS, J.

JACKSON, J.